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OFFICE OF PETITIONS

In re Application of :
Robert J. D'Amato et al :
Application No. 09/899,702 :
Filed: July 5, 2001 :
Attorney Docket No. 05213-091 (43170-219505) :

ON PETITION

This is a decision on the renewed petition under 37 CFR 1.137(b), filed February 5, 2004, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." No additional fee is required with any renewed petition. Petitioner is advised that this is **not** a final agency action decision.

A grantable petition to revive an abandoned application under 37 CFR 1.137(b) must be accompanied by: (1) the required reply (unless previously filed), which may be met by the filing of a continuing application in a nonprovisional application abandoned for failure to prosecute, but must be the payment of the issue fee or any outstanding balance thereof in an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)). This petition lacks item (1) above.

Petitioner states that this application is abandoned for failure to timely reply to the nonfinal Office action of November 29, 2002 within the period set therefor. In this regard, the reply mailed via certificate of mailing has the wrong date; i.e., February 26, 2002 rather than February 26, 2003. Therefore, the mailing certificate was defective and could not establish a proper date of receipt of the response under 37 CFR 1.8.

Petitioner is correct that the mailing certificate was defective and cannot be relied upon as establishing the date of mailing. Therefore, the effective date of receipt of the reply is the date of receipt in the USPTO; i.e., March 4, 2003. Accordingly, at the time of submission of the reply, a one month extension of time was due.

Effective December 1, 1997, 37 CFR 1.136(a)(3) permits a general authorization to treat any future reply requiring an extension of time as incorporating a request therefor. Any request or petition for extension of time will be treated as requesting the appropriate length of time. Papers will be liberally interpreted as petitions for extensions of time. Also, 37 CFR 1.136(a)(3) also treats a general authorization to charge all required fees or fees under 37 CFR 1.17 as a constructive petition for an extension of time for a concurrent or future reply requiring an extension of time.

Upon review of the file record, it is noted that, upon the filing of the application, the transmittal letter therefor contains a general authorization to charge "any additional fees required under 37 C.F.R. 1.16 or 1.17 to Deposit Account 11-0855." Accordingly, the presence of this general authorization in the file is being construed as a petition for a one month extension of time for the reply received on March 4, 2003. In view thereof, this application did not become abandoned for failure to timely reply to the Office action of November 29, 2002.

However, this application is abandoned for failure to timely reply to the final Office action of June 4, 2003, as petitioner has not submitted an amendment that places the application in condition for allowance. In this regard, note the attached copy of an Advisory Action from the Examiner. Accordingly, before revival of this application can be effected, a proper reply to the final Office action of June 4, 2003 must be submitted (i.e., Notice of Appeal, RCE and submission under 37 CFR 1.114, or continuation application under 37 CFR 1.53(b)).

Further correspondence with respect to this matter should be addressed as follows:

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Telephone inquiries concerning this decision should be directed to Wan Laymon at (703) 306-5685.

Wan Laymon
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Office of the Deputy Commissioner
for Patent Examination Policy

Attachment: Advisory Action